United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/affidavit of Mailing

75-6047

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To be argued by
J. CHRISTOPHER JENSEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6047

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P/B

MARIA A. EISENHAUER, on her behalf and on behalf of her children, FRANCIS X. EISENHAUER and BRIAN F. EISENHAUER,

Appellant,

—against—

DAVID MATHEWS, individually and in his capacity as Secretary of the Department of Health, Education and Welfare,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
United States Attorney
Eastern District of New York

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Of Counsel.

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Docket No. 75-6047

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Appellee.

BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal from a final judgment of the United States District Court for the Eastern District of New York (Bruchhausen, *J.*) in favor of the Secretary of the United States Department of Health, Education and Welfare ("Secretary") sustaining the Secretary's decision on appellant's application for Social Security survivors benefits on behalf of herself and her children. Judgment was entered by the clerk of the district court on June 3, 1975, in conformity with the opinion and order of the district judge dated May 29, 1975 (decision

unreported),[1] granting summary judgment for the Secretary appellee pursuant to Rule 56 of the Federal Rules of Civil Procedure.[2]

Appellant brought this action under 42 U.S.C. § 405 (g) for judicial review of a final decision of the Secretary denying appellant's claim that survivors benefits for herself and her two children were improperly reduced as the result of the Secretary's decision also granting survivors benefits to four alleged "stepchildren" of the deceased wage-earner.

The district court, after consideration of the record, found that the decision of the administrative law judge that the four stepchildren were also eligible beneficiaries of the deceased was correct (228a).

Statement of the Case

A. Facts

The material facts are not in dispute in this action so the government incorporates by reference herein the statement of the material facts as enumerated in the district court opinion (225a-228a).[3] What follows is a

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[1] The district court's opinion appears at pages 224(a) to 228(a) of the Joint Appendix. All references herein shall be to the Joint Appendix, although it should be noted that pages (i)(a) to 223(a) of the Joint Appendix correspond exactly to pages (i) to 223 of the transcript of the administrative record, 4 copies of which have also been filed with this Court.

[2] At the district court level, the Secretary was Caspar Weinberger and the district court caption reflected that name. The Secretary is now David Mathews. Accordingly, we have moved, along with the filing of this brief (Rule 43(c), F.R.A.P.), for a substitution of parties.

[3] There is, however, a definite controversy between the parties with respect to the inferences to be drawn from those facts as discussed in Point 2, *infra*.

statement of the administrative and district court proceedings.

B. Proceedings below

Francis E. Eisenhauer, a fully insured wage-earner under the Social Security Act, died on June 9, 1970 (118a). On June 29, 1970, the appellant Maria A. Eisenhauer, filed an application for social security survivors benefits for herself as a widow of the deceased, and for her two minor children, Brian and Francis (98a-105a). This application was approved and the appellant began receiving the maximum statutory benefits retroactive to June, 1970 (106a).

On September 23, 1970, Sonja Radauscher Eisenhauer, Francis Eisenhauer's second wife also filed an application for survivors benefits on behalf of her three children, Francis E. Eisenhauer, Sonja L. Eisenhauer, and Ursula M. Eisenhauer, all of whom were born to Sonja and were fathered by the deceased wage-earner.[4] The Secretary granted child's insurance benefits to these children commencing in September, 1970 (194a).

On April 28, 1972, Sonja filed an application for survivors benefits on behalf of the four children of her previous marriage to Andreas Radauscher, Monika, Andreas Jr., Erich, and Wilhelm Radauscher (167a-170a). These four children were also found to be eligible to receive benefits on the deceased wage-earner's policy as

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[4] Appellant has stipulated that Sonja L. and Ursula are the natural children of the wage-earner, and while there is a dispute over the paternity of Francis E. Eisenhauer, his birth certificate shows the wage-earner to be his father (172a). The Secretary did not resolve this dispute in light of his finding that all of Sonja's children were eligible for benefits.

"stepchildren" of the deceased commencing in April, 1972 (194a-195a).

As a result of the eligibility of the seven children of Sonja Radauscher Eisenhauer, the benefits to appellant and her children were reduced pursuant to Section 203(a) of the Social Security Act (hereinafter the "Act"), 42 U.S.C. § 403(a) because the total benefits to be paid now exceeded the family maximum established under Section 215(a) of the Act, 42 U.S.C. § 415(a).

Appellant was notified of the reduction of her benefits by an overpayment letter dated May 19, 1972 (107a). Subsequently the Secretary waived recoupment of the overpayment because of appellant's obvious good faith in previously accepting the full benefit payments (136a).

Appellant requested reconsideration of the decision to reduce benefits payable to her and her children as a result of the addition of Sonja's children as beneficiaries under the deceased's policy (108a).[4a] After reconsideration, the Bureau of Retirement and Survivors Insurance of the Social Security Administration concluded that their original decision to confer benefits on Sonja's children was correct (109a-115a).

Appellant then appealed this decision administratively and a hearing was held on May 18, 1973 (44a). Appellant appeared and testified at the hearing and was represented by counsel. The administrative law judge before whom the appellant appeared considered the case *de novo* and on July 25, 1973 issued a decision affirming the decision to grant benefits to Sonja's children and to correspondingly reduce the benefits to appellant and her children (19a-29a).

[4a] At the administrative level appellant claimed that error was committed with respect to the addition of *all* of Sonja Eisenhauer's children. When the matter was brought into the District Court, however, appellant dropped the claim with respect to the natural children. No explanation was given by appellant in the district court (nor has one been given on appeal) as to why that aspect of the claim has not been pressed.

The decision of the administrative law judge became the final decision of the Secretary when it was approved by the Social Security Appeals Council on November 30, 1973 (13a).

ARGUMENT

POINT I

The district court properly affirmed the decision of the Secretary that the children of Sonja Radauscher Eisenhauer by her previous marriage are eligible for survivors benefits as step-children of the deceased wage-earner under Section 216(e) of the Social Security Act.

This appeal involves an unusual factual situation in which a wage-earner dies leaving two separate families behind him who depended upon him for their support. Both families then applied for social security benefits on the account of the deceased wage-earner.

As a result of a provision of the Social Security Act which establishes the maximum amount of benefits payable on the basis of the wages of the individual, 42 U.S.C. § 415(a), the amount of benefits payable to each dependent of such individual must be reduced per capita so that the total benefits will not exceed the maximum, 42 U.S.C. § 403(a). This means that whenever the wage-earner has a large number of dependents, each dependent will individually receive less benefits than would be allowed by statute if there were fewer dependents competing for the benefits.

Normally the dependents form one family unit so that there is no open competition for the benefits in the

form of seeking to have one of the other dependents declared ineligible to receive benefits. In the instant case, however, a somewhat anomalous situation is created by the fact that Congress has passed a law which makes certain individuals eligible for benefits as "children" of the deceased even though they would not otherwise have any legal relationship with the deceased because of a defect in the deceased's marriage to the children's mother. Of course, this has led the first wife and her children, who bitterly resent their father's second family, to seek to have this second family disqualified from receiving the social security benefits.

Now, the first wife and her children appear before this Court to request that several legal obstacles be put in the way of the children from the invalid marriage. The government believes that should appellant prevail, the remedial provisions of the Social Security Act which extend benefits to the "statusless" children will be vitiated and this class of children will be in peril of being "disinherited" irrespective of whether there are competing dependents for the benefits.[5]

Appellant's position, simply stated, is that these children are not to be deemed "stepchildren" of the deceased under Section 216(e) because Sonja Radauscher did not go through her marriage ceremony with the deceased wage-earner in "good faith" and without knowledge of

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[5] We have appended hereto the pertinent portions of Section 208 of Public Law 86-778 enacted in September, 1960, which contain the amendments to the Social Security Act with respect to invalid ceremonial marriages. Section 208(a) applies to the eligibility of spouses and contains a clearly stated "good faith" requirement. Sections 208(b) and (c) apply to the natural (i.e., illegitimate) children and stepchildren, respectively, of the second marriage. Neither of these identical provisions contain any reference to a "good faith" ceremonial marriage.

the prior undissolved marriage between the deceased and the appellant.

In effect, appellant is asking this Court to read into Section 216(e) the "good faith" requirement which is statutorily mandated with respect to the eligibility of surviving spouses for benefits—a requirement that would destroy the remedial purpose of the statute.

Section 216(h)(1)(B) of the Act, 42 U.S.C. § 416(h)(1)(B) provides that for determining the eligibility of a surviving spouse for benefits, a person may be deemed a spouse only if he or she "in *good faith* went through a marriage ceremony . . . resulting in a purported marriage . . . which *but for a legal impediment not known to the applicant at the time of such ceremony*, would have been a valid marriage. . . ." (Emphasis added). Under this section, Sonja herself would clearly not be eligible for benefits under the wage-earner's policy if she knew of the wage-earner's prior undissolved marriage at the time of her own purported marriage with the wage-earner in Elkton, Maryland (209a-210a).[6]

Now, appellants ask this Court to apply the same standard to Section 216(e) which defines whether children are to be deemed "stepchildren" of the wage-earner

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[6] The government notes that the issue of whether Sonja entered this marriage in "good faith" was not decided by the administrative law judge because of his conclusion that there is no statutory good faith requirement with respect to the children's eligibility. Therefore, if this Court were to reverse the decision of the Secretary, it would be appropriate to remand the case for a further administrative hearing at which Sonja could be afforded an opportunity to refute appellant's allegations about her lack of good faith and also about the dependency of her children as discussed in Point II, *infra*.

in cases of a second, invalid ceremonial marriage. Section 216(e) provides only:

> ". . . a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if . . . the mother or adopting mother or the father or adopting father as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section would have been a valid marriage." 42 U.S.C. § 416(e).

(The last sentence of subsection (h)(1)(B) defines a legal impediment as "an impediment (i) resulting from the lack of dissolution of a previous marriage . . .")

There is no statutory requirement whatsoever that a "good faith" marriage take place before the stepchildren are to be deemed eligible children under their deceased stepfather's social security insurance policy. The reason for this distinction in the treatment of the stepchildren is obvious. There is an element of fault attributable to a man or woman who goes through a ceremonial marriage knowing it to be invalid and illegal. It is completely rational social policy not to reward the "bad faith" spouse with social security benefits on the account of his or her marriage partner.

Quite clearly, however, Congress has decided that the parents' bad faith shall not be imputed to the children in determining their eligibility for benefits, so long as they had been living with the deceased wage-earner or were otherwise dependent upon him. Whatever the legal status of the parents' marriage, the children have clearly lost a person on whom they were dependent for support.

In these circumstances, it would be completely irrational social policy to deny the children the right to receive social security benefits because of the state of mind of the surviving parent.

This view of the Congressional purpose is reinforced by the fact that the statute which defines the status of the natural children of the deceased wage-earner by his second, invalid ceremonial marriage, i.e., "illegitimate" children of the deceased, is identical to the stepchild section. See 42 U.S.C. § 416(h)(2)(B). Neither statute requires that the second ceremonial marriage be in "good faith" as a precondition to the children's eligibility for benefits.

It is significant that the appellant has abandoned her challenge to the eligibility of the wage-earner's natural children by his union with Sonja. Appellant could just as easily assert that these children are ineligible because the same "good faith" requirement must be read into the parallel language of 416(h)(2)(B) which deals with the illegitimate children of a second invalid ceremonial marriage.

Obviously appellant is unwilling to ask this Court to apply the "good faith" test to the illegitimate children, because such a test would make it more difficult for these illegitimates to establish their eligibility for benefits than for other illegitimate or legitimate children of the deceased. By so doing, the Court would be giving an unconstitutional reading of the statute under its own recent decision in *Adams* v. *Weinberger*, — F.2d —, Docket No. 75-7098 (2d Cir., Slip Opinion pg. 5453, August 7, 1975).

The appellant, then, would have the Court apply "good faith" only to the stepchildren's statute and not to the illegitimate children's statute, even though their language

is identical. Such an application would achieve an unconstitutional result. This underscores the illogicality of appellant's attempt to engraft a restriction on the statute which is not contemplated by its clear language.

Appellant argues that "good faith" must be read into these statutes or else the Social Security Administration would be "vulnerable to outright fraud in ceremonial marriages used as a basis for Social Security benefits eligibility." (Appellant's brief at pg. 14).

In support of this argument, the appellant cites the Supreme Court's recent decision of *Weinberger* v. *Salfi*, — U.S. —, 43 U.S.L.W. 4985 (1975). In *Salfi* the Supreme Court sustained the validity of Section 216(e)(5) and (e)(g) of the Social Security Act, 42 U.S.C. §§ 416 (c)(5) and (e)(2), which define "widow" and "child" so as to exclude surviving wives and stepchildren who had their respective relationships with the deceased wage-earner for less than nine months prior to his death.

Appellant cites language from the Court's decision in *Salfi* to the effect that the Social Security Administration has a legitimate interest in preventing fraudulent or "sham" marriages for the sole purpose of establishing eligibility for impending survivor's or disability benefits. Appellant overlooks, however, the Court's conclusion in *Salfi*, *supra*, that the nine-month duration requirement is exactly the remedy which Congress has fashioned to prevent such fraud. As such, that remedy would be equally effective in the present context.[7]

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[7] It can hardly be said that Sonja engaged in a ceremonial marriage with the deceased wage-earner in anticipation of his sudden death 10 months later.

The Secretary's interpretation of the statute as not requiring a "good faith" ceremonial marriage, implicitly or otherwise, is a legal conclusion which is reviewable in its entirety by this Court. *Herbst* v. *Finch*, 473 F.2d 771 (2d Cir. 1972); *Adams* v. *Weinberger*, *supra*. The government believes, however, that the Secretary's legal conclusion must be assessed in light of this Court's holding that the "Social Security Act is remedial and its humanitarian aims necessitate that it be construed broadly and applied liberally." *Adams* v. *Weinberger*, *supra*, at 5458; *Gold* v. *Secretary of Health, Education and Welfare*, 463 F.2d 38, 41 (2d Cir. 1972); *Haberman* v. *Finch*, 418 F.2d 664, 667 (2d Cir. 1969).

If appellant's interpretation of the statute is adopted by this Court, a potentially large class of children will be denied social security benefits on the insured status of a disabled or deceased wage-earner on whom they were dependent for their support. In the instant case, there is a somewhat difficult choice between the claims of the competing spouses and their children. The Court should not be misled, however, by the difficulties inherent in this case into establishing a prophylactic rule which will necessarily deny benefits to all children of second "bad faith" marriages irrespective of whether there are competing claims for benefits.[8]

In support of this harsh interpretation of the statute, appellant cites *dicta* in two decisions which are completely inapposite to the instant appeal, *Moots* v. *Secretary of Health, Education and Welfare*, 349 F.2d 518 (4th

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[8] In many instances, of course, there may not be any claiming *dependent* survivors of the first marriage relationship or the claims of all the dependent survivors may be satisfied without exceeding the maximum family limit established by Section 203(a) of the Act, 42 U.S.C. § 403a.

Cir. 1965), *cert. denied*, 382 U.S. 996 (1965) and *Jiminez* v. *Weinberger*, 417 U.S. 628 (1974).

The *Moots* decision also deals with competing claims of two women both alleging that they are the widow of the deceased. In *Moots*, however, the alleged second wife did not establish that she had ever engaged in a ceremonial marriage, thus the "good faith" requirement of the ceremonial marriage provisions at issue here was not even considered by the Court.

A careful reading of the Court's language at page 521 of the *Moots* decision indicates that the Court is merely confusing the statutory language of 42 U.S.C. § 416(h)(2)(B) dealing with the eligibility of illegitimates with the language of 42 U.S.C. § 416(h)(1)(B) dealing with the widow's eligibility. The contention that the Fourth Circuit actually considered the "good faith" problem and applied the standard to children's eligibility is simply born out of desperation.

The Supreme Court's decision in *Jiminez*, *supra*, stands for even less. In the context of a decision *expanding* the rights of illegitimates, the Court in an aside notes that the Social Security Act provides benefits to illegitimate children whose illegitimacy "results solely from formal, non-obvious defects in their parents' ceremonial marriage." 417 U.S. at pp. 634, 635. Again, of course, the statement relied upon by appellant is obvious *dictum* in a decision in which the "good faith" requirement was not an issue and was not considered in the least by the Supreme Court.

Appellant's contention that the Court's choice of the phrase "nonobvious defects" implies that the Court was reading a "good faith" requirement into the statute strains credulity. It is totally implausible to assume

that the Supreme Court would read into the statute such an additional requirement without any discussion of the purpose of the legislation, or of the diverse social ramifications such a requirement would create.

Finally, appellant asks this Court to examine the legislative history of the statute in order to ascertain the congressional intent. It is well established that where the words of a statute are clear and unambiguous. as they are here, the Courts are to conclusively presume that the explicit terms of the statute express the legislative intention. *United States* v. *American Trucking Associates*, 310 U.S. 534 (1940), *rehearing denied*, 311 U.S. 724 (1940); *United States* v. *Oregon*, 366 U.S. 643 (1961). It is also a general rule that Courts may not, by construction, insert words or concepts into the language of a statute. *United States* v. *Cooper Corporation*, 312 U.S. 600, 605 (1941). *United States* v. *Monia*, 317 U.S. 424, 430 (1943).

As the Supreme Court stated in *Cooper Corporation*, *supra*:

> . . . [W]e are to read the statutory language in its ordinary and material sense, and if doubts remain, resolve them in the light, not only if the policy intended to be served by the enactment, but, as well, by all other available aids to construction. But it is not our function to engraft on a statute additions which we think the legislature, logically might or should have made. 312 U.S. at 605.

The Court should be particularly wary of engrafting a good faith requirement on the instant statute where the circumstances of its adoption strongly suggest that no such requirement was intended and where the statute is to be "interpret[ed] in the light of the remedial provisions underlying the Act as a whole." *Williams* v. *Rich-*

ardson, — F.2d — Dkt. No. 74-1622 (2d Cir. slip op. —; decided September 26, 1975).

All of the ceremonial marriage provisions were enacted as part of H.R. 1250, a bill containing several amendments to the Social Security Act, which was enacted as Public Law 86-778 on September 13, 1960. The ceremonial provisions were all set forth in Section 208 of the enactment (See Addendum, *infra*). Section 208(a) contains the amendment with respect to surviving spouses eligibility for benefits on the basis of an invalid ceremonial marriage. Sections 208(b) and (c) deal with the eligibility of the natural children and stepchildren, respectively, of the second invalid ceremonial marriage.

Although the "good faith" requirement is specifically stated in Section 208(a) of the enactment, it is completely absent from Sections 208(b) and (c). It should also be noted that the entirety of Section 208 was adopted as originally drafted without debate or amendment by either the House or Senate.

The language of the House and Senate reports on H.R. 1250 is identical in describing Section 208. Both initially describe the ceremonial provision for spouses and refer in detail to the "good faith" requirement. House Report No. 1799, 86th Congress, 2d Session, p. 16 and Senate Report No. 1856, 86th Congress, 2d Session, p. 22. The last sentence of the paragraph containing this description simply states:

> In addition, the bill would make eligible for benefits the child or stepchild of a couple who had gone through a marriage ceremony that because of such an impediment could not result in a valid marriage. *Id.*

From appellant's point of view, this legislative history is at best inconclusive. On the other hand, to read "good faith" into the children's ceremonial marriage provision would be a tacit statement that Congress committed a major, self-evident, error in drafting the statute. The government does not believe such a conclusion is warranted.

POINT II

The Secretary's decision that the wage-earner's stepchildren were dependent upon him at his death within the meaning of the Social Security Act is supported by substantial evidence.

After it has been determined that a person is a surviving child of the deceased wage-earner within the meaning of 42 U.S.C. § 402(d)(1), eligibility for survivors benefits depends upon a showing that such child:

> (c) was dependent upon such individual . . . at the time of such death . . . 42 U.S. 402(d)(1)

In addition, there is a statutory presumption that:

> A child shall be deemed dependent upon his stepfather or stepmother at the time specified in paragraph (1)(C) of this subsection [i.e., time of death], if, at such time, the child was living with or was receiving at least one-half of his support from such stepfather or stepmother. Section 202 (d)(4), 42 U.S.C. § 402(d)(4)

The government contends that the Secretary's decision that the deceased wage-earner was living with his stepchildren at the time of his death is supported by substantial, uncontested evidence in the record, and that this finding alone is sufficient to satisfy the "dependency"

requirement of the Social Security Act with respect to the stepchildren's eligibility for survivors benefits. Contrary to appellant's assertions, the Secretary, having found that the wage-earner was residing with his stepchildren at his death, was not required to consider further evidence of the stepchildren's *actual* dependency.

Assuming *arguendo* that the deemed dependency presumption is not conclusive, the government does not believe that the evidence of record rebuts the presumption in favor of the stepchildren's eligibility.

Section 205(g) of the Act, 42 U.S.C. § 405(g), provides that the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. Thus the Secretary's findings, if reasonable, shall not be disturbed by the Court on review. *Richardson* v. *Perales*, 402 U.S. 389 (1971); *Franklin* v. *Secretary*, 393 F.2d 610 (2d Cir. 1968).

The conclusive effect of the substantial evidence rule applies not only with respect to the Secretary's findings as to basic evidentiary facts, but also to inferences and conclusions drawn therefrom. *Levine* v. *Gardner*, 360 F.2d 953 (1st Cir. 1966); *Palmer* v. *Celebreeze*, 334 F.2d 306 (3d Cir. 1964).

The administrative law judge found that the deceased wage-earner and Sonja Radauscher Eisenhauer began living together subsequent to September 7, 1965 (23a). Implicit in the administrative law judge's discussion of this finding is that deceased wage-earner and Sonja were still living together at Sonja's residence at 100 Puha Road, South Plainfield, New Jersey at the time of his death (26a).

In fact, counsel for the appellant stipulated at the administrative hearing that the deceased, Francis Eisenhauer, lived with Sonja during his period of separation from the appellant (64a). The deceased's tax-return for the last year of his life also indicates that he was living with his illegitimate children at their mother's residence in New Jersey (215a). Of course, Sonja had claimed that the deceased was living with her at his death (169a) and, after an investigation, this claim was sustained by the Bureau of Retirement and Survivor's Insurance (179a).

After the hearing, appellant reversed her position and claimed that the deceased was not living with Sonja at his death (32c). The only evidence that the appellant could master to rebut the finding of the Bureau of Survivor's Insurance was an indication of the Maryland marriage license (the ceremonial marriage between the deceased and Sonja) that the deceased maintained a different address.

Apparently, on the strength of this evidence, the appellant obtained a default judgment in the New York State Supreme Court, Nassau County, declaring that the deceased resided at an address in Queens, New York, at his death (149a). On the basis of this judgment, the death certificate was amended to show the Queens address rather than the original address of Sonja's residence in New Jersey (150a).

There can be little doubt that the administrative law judge was not acting unreasonably by refusing to hold that the appellant had failed to discharge her burden of

proving that the deceased was not living with his stepchildren at his death.[9]

Appellant argues, however, that the Secretary was required to make an independent finding under the Social Security regulations, 20 C.F.R. § 404.1113 that, in addition to living with his stepchildren, the deceased was "exercising or ha[d] the right to exercise parental control and authority over the child."

In making this argument, appellant overlooks her burden to disprove the stepchildren's eligibility (Footnote 9, *supra*). The record is devoid of a finding that the deceased was exercising parental control because the appellant did not put this requirement in issue and did not submit any evidence whatsoever to show that "parental control" was lacking.

As noted in footnote 9, *supra*, in the absence of rebuttal evidence, the decision by the Bureau of Retirement and Survivor's Insurance that the stepchildren have satisfied the eligibility requirements of the Act is to be sustained without further inquiry.

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[9] Throughout her brief, appellant continually overlooks the fact that the burden of proof is upon the applicant, *Kerner* v. *Flemming*, 283 F.2d 916, 922 (2d Cir. 1960), and in this instance, the eligibility of Sonja's children was presumptively valid and had to be overcome by the appellant. Sonja's children should not, and could not, be required to re-prove their eligibility unless the appellant had established a *prima facie* case rebutting their eligibility. In this respect, the government believes the administrative law judge was absolutely correct in his ruling that Sonja would not be compelled to attend a hearing on her children's eligibility unless the judge first found that the evidence submitted by appellant required a decision adverse to Sonja's children's interests (61a, 95a).

Appellant's second argument, apparently is that assuming the deemed dependency provision is applicable, the evidence of record rebuts any presumption of dependency. The unstated premise of this argument is that Congress intended to require actual dependency as a prerequisite of eligibility. The interpretation directly contradicts the plain language of Section 202(d) which provides in the disjunctive that a stepchild be deemed dependent if living with or receiving one-half of his support from his stepparent.

In addition to the clear language of the statute, there is a strong suggestion in the legislative history that Congress intended to provide benefits even to children not *actually* dependent on the deceased wage-earner. The Senate report on the 1950 amendments to the Social Security Act which added the deemed dependency provisions states that "the revised provisions will better protect those children whose fathers *were not able to give them full support.*" Senate Report, No. 1669, 81st Cong. 2d Sess. pg. (Emphasis added). This view is substantiated by the fact that the Act provides that natural and adopted children are deemed dependent even if the father was neither living with nor contributing to the support of that child, Section 202(d)(3). 42 U.S.C. § 402(d)(3).

After the Supreme Court's decision in *Weinberger* v. *Salfi, supra*, it is clear that an irrebutable presumption, or prophylactic rule, such as the deemed dependency provision at issue here, is not necessarily violative of due process as might have been inferred from the Court's earlier decisions. See, e.g., *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); and *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

Unlike all of these decisions, the conclusive presumption here is "over-inclusive" by having the effect of conferring benefits on a class of individuals larger than the class of actual dependents. The presumption is designed to make it easier for an applicant to obtain benefits. This not only comports with the test of "legislative reasonableness" set forth in *Salfi, supra,* 43 U.S.L.W. at 4993, it comports with this Court's view that the Social Security Act is remedial and is to be construed in favor of granting benefits to an applicant. *Adams* v. *Weinberger, supra; Cutler* v. *Weinberger*, 516 F.2d 1282 (2d Cir. 1975); and *Gold* v. *Secretary of HEW, supra.*

Shoud this Court disagree and find that the Secretary was required to accept rebuttal evidence, the government does not believe the evidence of record does, in fact, rebut the statutory presumption.

First, it should be noted that the administrative law judge specifically allowed the appellant to submit evidence concerning the stepchildren's dependency before reaching his decision (72-73a). The administrative law judge considered such evidence but found it irrelevant in light of his conclusion that the dependency requirement was satisfied by the finding that the deceased was living with his stepchildren at his death (26a-27a).

However, even under the hypothetical income projections discussed at pp. 27-29 of appellant's brief, the deceased wage-earner was contributing $9,340 out of a total household income for Sonja and her children of $12,980. In other words, by virtue of the wage-earner's death Sonja and her children lost 3/4 of their support, which resulted in Sonja going on welfare to support herself and her children (See her letter to the Social Security Administration at 185a).

Speculation about sources of the children's income is not adequate to contradict the reality of Sonja's plight. In addition, this speculation was not in evidence before the administrative law judge and forms no part of the record upon which he based his decision. The appellant simply has not discharged the burden of rebutting the dependency of the stepchildren.

CONCLUSION

For reasons hereinbefore set forth, and upon the record and opinion below, the judgment of the United States District Court for the Eastern District of New York in this action should be affirmed.

Dated: Brooklyn, New York
September 29, 1975

Respectfully submitted,

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ADDENDUM

Public Law 86-778

[EXCERPT]

MARRIAGES SUBJECT TO LEGAL IMPEDIMENT

Sec. 208. (a) Section 216(h)(1) of the Social Security Act is amended by inserting "(A)" after "(1)", and by adding at the end thereof the following new subparagraph:

"(B) In any case where under subparagraph (A) an applicant is not (and is not deemed to be) the wife, widow, husband, or widower of a fully or currently insured individual, or where under subsection (b), (c), (f), or (g) such applicant is not the wife, widow, husband, or widower of such individual, but it is established to the satisfaction of the Secretary that such applicant in good faith went through a marriage ceremony with such individual resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage, and such applicant and the insured individual were living in the same household at the time of the death of such insured individual or (if such insured individual is living) at the time such applicant files the application, then, for purposes of subparagraph (A) and subsections (b), (c), (f), and (g), such purported marriage shall be deemed to be a valid marriage. The provisions of the preceding sentence shall not apply (i) if another person is or has been entitled to a benefit under subsection (b), (c), (e), (f), or (g) of section 202 on the basis of the wages and self-employment income of such insured individual and such other person is (or is deemed to be) a wife, widow, husband, or widower of such insured individual under

subparagaph (A) at the time such applicant files the application, or (ii) if the Secretary determines, on the basis of information brought to his attention, that such applicant entered into such purported marriage with such insured individual with knowledge that it would not be a valid marriage. The entitlement to a monthly benefit under subsection (b), (c), (e), (f), or (g) of section 202, based on the wages and self-employment income of such insured individual, of a person who would not be deemed to be a wife, widow, husband, or widower of such insured individual but for this subparagraph, shall end with the month before the month (i) in which the Secretary certifies, pursuant to section 205(i), that another person is entitled to a benefit under subsection (b), (c), (e), (f), or (g) of section 202 on the basis of the wages and self-employment income of such insured individual, if such other person is (or is deemed to be) the wife, widow, husband, or widower of such insured individual under subparagraph (A), or (ii) if the applicant is entitled to a monthly benefit under subsection (b) or (c) of section 202, in which such applicant entered into a marriage, valid without regard to this subparagraph, with a person other than such insured individual. For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (i) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (ii) resulting from a defect in the procedure followed in connection with such purported marriage."

(b) Section 216(h)(2) of such Act is amended by inserting "(A)" after "(2)", and by adding at the end thereof the following new subparagraph:

"(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not

deemed to be the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage."

(c) Section 216(e) of such Act is amended by adding at the end thereof the following new sentence: "For purposes of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage betwen them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B), would have been a valid marriage."

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 1st day of October 1975 he served two copies of the within

Brief for Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Philip M. Cassel, Esq.
Legal Services for the Elderly Poor
2095 Broadway - Room 304
New York, N. Y. 10023

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
1st day of October 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4601965
Qualified in Kings County
Commission Expires March 30, 1977